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EMILIA HANAFI v. DATUK WIRA SM FAISAL TAN SRI SM NASIMUDDIN KAMAL & ORS

HIGH COURT MALAYA, KUALA LUMPUR
AHMAD KAMAL MD SHAHID J
[JUDICIAL REVIEW NO: WA-25-392-06-2022]
B 21 NOVEMBER 2022

Abstract – *(i) The Kuala Lumpur Syariah High Court has the jurisdiction to hear and determine cases on committal proceedings which include contempt of court for a custody order; and (ii) The proceedings and decisions of the Syariah Courts are not amenable to judicial review by the civil courts. The Syariah Courts and the civil courts form two separate legal systems; the Syariah Courts are not inferior to the civil courts in terms of appeal and judicial review by superior courts over inferior courts.*

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CONSTITUTIONAL LAW: *Courts – Syariah Court – Jurisdiction – Applicant violated custody order and punished for contempt by Syariah High Court – Whether Syariah Court seized with jurisdiction to hear and determine cases on committal proceedings which include contempt of court for custody order – Administration of Islamic Law (Federal Territories) Act 1993, s. 46 – Islamic Family Law (Federal Territories) Act 1984, ss. 81, 82, 83, 84, 85, 86 & 87 – Syariah Court Civil Procedure (Federal Territories) Act 1998, s. 151*

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CONSTITUTIONAL LAW: *Courts – High Court – Jurisdiction – Application for leave for judicial review against decision of Syariah Court – Applicant punished for contempt by Syariah High Court – Whether civil courts seized with jurisdiction to hear and determine cases involving Syariah matters – Whether proceedings and decisions of Syariah Courts amenable to judicial review by civil courts – Federal Constitution, art. 121(1A)*

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G The applicant and the first respondent were married and blessed with three children. Following their divorce, the Kuala Lumpur Syariah High Court ('KLSHC') granted the applicant custody and visitation rights over all three children ('custody order'). The first respondent filed an application for leave to issue a show cause notice at the KLSHC where the complaint was that there were three violations of the custody order. The application was allowed; the applicant filed a show cause notice but the KLSHC dismissed the same and decided that the applicant shall be imprisoned. The applicant then appealed against the decision of the KLSHC to the Kuala Lumpur Syariah Appeal Court. The first respondent, on the other hand, filed an application for leave to issue another show cause notice at the KLSHC following two violations of the custody order by the applicant. The applicant's appeal was struck out while the first respondent's application was

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allowed. Hence, the present application by the applicant, for leave to apply for judicial review, pursuant to O. 53 r. 3 of the Rules of Court 2012. The issues that arose for adjudication were, *inter alia*, (i) whether the Syariah Court had the power to punish an individual for contempt of court; (ii) whether the civil court had the jurisdiction to hear and determine cases on committal proceedings which include contempt of court for a custody order; and (iii) whether leave from the Federal Court was required to challenge the validity of the law conferring jurisdiction to the KLSHC for contempt proceedings.

Held (dismissing application):

(1) By virtue of s. 46 of the Administration of Islamic Law (Federal Territories) Act 1993 and ss. 81 to 87 of the Islamic Family Law (Federal Territories) Act 1984, it is crystal-clear that the KLSHC had the jurisdiction to hear and determine all proceedings related to the issue of custody. Section 151 of the Syariah Court Civil Procedure (Federal Territories) Act 1998 ('Act 585') specifically mentioned that the consequence of disobeying the order of courts is that an order of committal may be given with leave of the court. Based on s. 151 of Act 585, the first respondent was exercising his rights in filing a committal application at the KLSHC when the applicant violated the custody order. It was within the jurisdiction of the KLSHC to hear and decide such a case or application. (paras 44, 46 & 47)

(2) Pursuant to art. 121(1A) of the Federal Constitution ('FC'), proceedings before the Syariah Courts and decisions made by the Syariah Courts could not be reviewed by the civil High Courts. The subject matter in the present case pertained to committal proceedings against the applicant where she had violated the custody order. This subject matter did not involve any constitutional issue where it was vibrant that the enforcement of the judgment of a custody order was within the jurisdiction of the Syariah Court. The correct court which had the jurisdiction to deal with the dissatisfaction against the decision made by the Syariah Court was the Syariah Court of Appeal itself and such decision made by the Syariah Court of Appeal was not amenable to review, pursuant to art. 121(1A) of the FC. (paras 54, 58 & 59)

(3) Article 4(3) and (4) of the FC highlights that any person who seeks to challenge the validity or constitutionality of any law, on the ground that Parliament of the State Legislature has no power to enact the said law, must specifically ask a declaration that the law is invalid and such proceeding may only be commenced with the leave of a Judge of the Federal Court. Parliament's competency to establish Syariah Court in Federal Territories related to a matter enumerated in item 6(e) of List I, the Federal List under the Ninth Schedule together with Item I of List

A II, the State List under the Ninth Schedule. Therefore, it was Parliament that has the power to make laws for KLSHC. Since it was well-within Parliament's power to enact the alleged impugned provisions, the applicant's challenge did not fall within the scope of art. 4 of the FC. As such, leave of the Federal Court was not necessary for this B application. (paras 67-69)

Case(s) referred to:

Chong Wee Been lwn. Lembaga Pencegahan Jenayah & Yang Lain [2017] 1 LNS 903 HC ***(refd)***

Kijal Resort Sdn Bhd v. Pentadbir Tanah Kemaman & Anor [2015] 3 CLJ 861 FC ***(refd)***

C *Rosliza Ibrahim v. Kerajaan Negeri Selangor & Anor [2021] 3 CLJ 301 FC* ***(refd)***

Seruan Gemilang Makmur Sdn Bhd v. Pegawai Kewangan Negeri Pahang [2016] 4 CLJ 100 CA ***(refd)***

Sukma Darmawan Sasmitaat Madja v. Ketua Pengarah Penjara Malaysia & Anor [1999] 2 CLJ 707 FC ***(refd)***

Syarifah Nooraffyzza Wan Hosen v. Director Of Jabatan Agama Islam Sarawak & Ors D *[2018] 3 CLJ 620 CA* ***(refd)***

Tang Kwor Ham & Ors v. Pengurusan Danaharta Nasional Bhd & Ors [2006] 1 CLJ 927 CA ***(refd)***

Wan Johairiza Wan Ab Rahman v. Mahkamah Rayuan Syariah Selangor & Ors [2021] 1 LNS 2151 HC ***(refd)***

Wong Kin Hoong & Anor v. Ketua Pengarah Jabatan Alam Sekitar & Anor [2013] 4 CLJ E *193 FC* ***(refd)***

WRP Asia Pacific Sdn Bhd v. Tenaga Nasional Bhd [2012] 4 CLJ 478 FC ***(refd)***

Legislation referred to:

Administration of Islamic Law (Federal Territories) Act 1993, ss. 40, 46

Federal Constitution, arts. 4(3), (4), 74(1), 121(1A), 128, Item 1, List II, Ninth F Schedule

Islamic Family Law (Federal Territories) Act 1984, ss. 81, 82, 83, 84, 85, 86, 87,

Public Authorities Protection Act 1948, s. 2(a)

Rules of Court 2012, O. 3 r. 5, O. 53 r. 3(6), (7)

Rules of the High Court 1980, O. 53 r. 3(6)

Syariah Court Civil Procedure (Federal Territories) Act 1998, ss. 151, 229

G *For the applicant - Nizam Bashir Abdul Kariem Bashir; M/s Nizam Bashir & Assocs*

For the Honourable Attorney General - Mohammad Sallehuddin Md Ali, FC

For the putative first & second respondents - Akberdin Abdul Kader, Ummi Kartini Abd Latif & Ardy Suffian Akberdin; M/s Akberdin & Co

Reported by Najib Tamby

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JUDGMENT

Ahmad Kamal Md Shahid J:

Introduction

I **[1]** On 8 June 2022, the applicant filed an application (encl. 1) that leave be granted to apply for judicial review under O. 53 r. 3 of the Rules of Court 2012 (ROC).

[2] On 19 July 2022, the applicant filed a notice of application (encl. 26) to amend this leave application for judicial review to ascertain the real controversial issues between parties.

[3] The amendment application was also made to remove two of the respondents therein, namely the Chief Registrar of the Federal Territories Syariah Court of Appeal and the Syariah Court of Appeal in Kuala Lumpur.

[4] On 20 July 2022, I allowed the applicant's notice of application to amend the leave application for judicial review with no order as to costs since there is no objection by all parties.

[5] Now, the applicant seeks the following reliefs in this leave application for judicial review (encl. 32):

(i) Kebenaran memfailkan permohonan untuk semakan kehakiman untuk relif-relif berikut:

(a) sekiranya perlu, tempoh masa untuk membuat permohonan ini dilanjutkan sehingga tarikh pemfailan permohonan ini mengikut A. 53 k. 3(6) Kaedah-kaedah Mahkamah 2012.

(b) Kebenaran memfailkan permohonan untuk semakan kehakiman untuk relif-relif berikut:

(1) suatu deklarasi bahawa Mahkamah Tinggi Syariah responden keempat tidak memiliki bidang kuasa atau kuasa untuk menghukum mana-mana individu untuk penghinaan mahkamah;

(2) suatu deklarasi bahawa:

(a) Pemohon, yang memiliki suatu hak kepada tindakan segera di bawah Pekeliling Perkhidmatan Bilangan 5 Tahun 2007 (Panduan Pengurusan Pejabat), dimungkiri haknya oleh responden ketiga atas ketiadaan jawapan kepada surat-surat pemohon dalam suatu jangkamasa yang munasabah setelah pengisuannya; dan

(b) Pemohon, yang memiliki hak untuk dibekalkan dengan salinan kertas kausa yang dipohon di bawah s. 234 Akta Tatacara Mal Mahkamah Syariah (Wilayah-wilayah Persekutuan) 1998, dimungkiri haknya oleh responden ketiga atas ketiadaan pembekaian yang sama dalam suatu jangkamasa yang munasabah.

(3) berkenaan dengan Prosiding Komital Syariah iaitu khususnya Mahkamah Tinggi Syariah Wilayah Persekutuan Kuala Lumpur Permohonan No: 14600-074-0169-2020:

(i) suatu Perintah Larangan yang menahan segala prosiding dalam Prosiding Komital Syariah tersebut; dan

A (ii) suatu perintah *certiorari* yang membatalkan pemeteraian notis permohonan, yang lebih dikenali sebagai Permohonan No. 14600-074-0169-2020 yang bertarikh 31 Oktober 2019, Perintah bertarikh 9 Februari 2022 dan pembatalan semua surat, notis, arahan, perintah atau arahan yang mesti dipatuhi B ("peremptory") atau sebaliknya apa-apa arahan lain yang dikeluarkan oleh atau bagi pihak responden keempat yang berkenaan dengan Prosiding Komital Syariah.

(4) suatu perintah deklarasi bahawa keputusan, tindakan atau peninggalan tersebut yang diperolehi dan/atau dibuat oleh C responden-responden atau mana-mana satu dari mereka adalah tidak sah atau batal.

(5) suatu perintah *certiorari* untuk memasukkan keputusan. Tindakan atau peninggalan tersebut untuk dibatalkan (quashed).

D (6) sebarang arahan, perintah atau writ lain bagi penguatkuasaan hak-hak yang diberikan oleh Bahagian II Perlembagaan Persekutuan, atau mana-mana daripada mereka, atau untuk memberikan keadilan yang sepenuhnya di dalam perkara di dalam ini.

E (7) suatu perintah, bahawa dalam apa cara sekalipun, tiada kos akan diawadkan bagi atau terhadap pemohon; dan

(8) lain-lain relif sepertimana yang difikirkan suaimanfaat oleh Mahkamah Yang Mulia ini.

F (a) selaras dengan A. 53 r. 3(5) Kaedah-kaedah Mahkamah 2012, suatu perintah pergantungan interim untuk menggantungkan prosiding komital di hadapan responden keempat yang dikenali sebagai Permohonan No. 14600-074-0169-2020 yang bertarikh 31 Oktober 2019 sementara menunggu pelupusan muktamad pendengaran prosiding semakan kehakiman ini.

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[6] The central question that falls to be decided in this intended judicial review is whether the Kuala Lumpur Syariah Court has the power or jurisdiction to punish an individual for contempt of court.

[7] After the hearing, I dismissed the applicant's amended application for H leave to commence judicial review (encl. 32). This is my judgment setting out the full reasons for my decision.

Background Facts

[8] The applicant and the first respondent were married on 8 July 2004. I They have three children in their marriage. On 29 January 2016, the applicant and the first respondent divorced.

[9] On 23 July 2018, the applicant and the first respondent (as well as his mother, the second respondent) recorded a consent judgment custody order) in Kuala Lumpur Syariah High Court, Summon No: 14100-028-0798-2015 (custody proceedings) where:

(i) the applicant was given permanent custody right over all three children; and

(ii) the first and second respondents were given rights of visitation.

[10] The first respondent filed an application for leave to issue a show cause notice in Kuala Lumpur Syariah High Court, Application No: 14400-099-0439-2018 (seventh committal proceedings).

[11] On 17 January 2019, the Kuala Lumpur Syariah High Court allowed the first respondent's application and a show cause notice and an order were sealed.

[12] Subsequently, the applicant was served with an order dated 17 January 2019 and a show cause notice dated 17 January 2019 where the complaint is that there were three violations of the custody order on 6 October 2018, 7 October 2018 and 10 October 2018.

[13] On 15 February 2019, the applicant filed a show cause affidavit. On 4 September 2019, the Kuala Lumpur Syariah High Court dismissed the show cause affidavit and decided that the applicant shall be imprisoned for seven days.

[14] On 30 September 2019, the applicant filed an appeal against the Kuala Lumpur Syariah High Court's decision dated 4 September 2019 in Kuala Lumpur Syariah Appeal Court, Appeal No: 14000-099-0073-2019 (committal appeal).

[15] On 31 October 2019, the first respondent filed an application for leave to issue another show cause notice in Kuala Lumpur Syariah High Court, Application No: 14600-074-0169-2020 against the applicant (eighth committal proceedings).

[16] On 1 December 2020, the committal appeal was struck out by the Kuala Lumpur Syariah Appeal Court because of the applicant's failure to appear on the date of the hearing of the application.

[17] On 9 February 2022, the Kuala Lumpur Syariah High Court allowed the first respondent's application and a show cause notice and an order were sealed.

[18] On 18 March 2022, the applicant was served with an order dated 9 February 2022 and a show cause notice dated 9 February 2022 where the complaint is that there were two violations of the custody order on 6 September 2019 and 18 October 2019.

[19] Based on the pleadings, the eighth committal proceedings is still ongoing at the Kuala Lumpur Syariah High Court.

[20] On 27 June 2022, it was reported in the news that the applicant has surrendered herself to Syariah Court to serve her seven days imprisonment's punishment as she failed to comply with the Kuala Lumpur Syariah High court's order on the visitation dates of the three children (seventh committal proceedings).

[21] It must be noted that based on the above situation, this leave application has been amended. Now, the reliefs sought are only focused on the eighth committal proceedings.

The Law

[22] The application before this Honourable Court is for leave to commence judicial review proceedings.

[23] The Federal Court in *WRP Asia Pacific Sdn Bhd v. Tenaga Nasional Bhd* [2012] 4 CLJ 478; [2012] 4 MLRA 257; [2012] 4 MLJ 296 speaking through Suriyadi Halim Omar FCJ (as His Lordship then was) held:

> ... Leave may be granted if the leave application is not thought of as frivolous, and if the leave is granted, an arguable case of granting the reliefs sought at the substantive hearing may be the resultant outcome. A rider must be attached to the application though, *ie*, unless the matter for judicial review is amenable to judicial review no success may be envisaged.

[24] Based on the judgment laid down in *WRP Asia Pacific Sdn Bhd* (*supra*), the test to be applied are as follows:

(i) whether the subject matter is amenable to judicial review; and if so

(ii) from the materials available, whether the application is frivolous and if not thought as frivolous, to consider that the applicant has an arguable case to obtain the relief sought at the substantive hearing.

[25] The principles governing applications for leave to commence judicial review proceedings have also been set out in *Tang Kwor Ham & Ors v. Pengurusan Danaharta Nasional Bhd & Ors* [2006] 1 CLJ 927; [2006] 5 MLJ 60; [2005] 2 MLRA 698 where Gopal Sri Ram JCA (as His Lordship then was) held:

> ... the High Court should not go into the merits of the case at leave stage. Its role is only to see if the application for leave is frivolous ... So too will the court be entitled to refuse leave if it a case where the subject matter of the review is one which by settled law (either written law of the common law) is non-justiciable.

[26] Based on the above oases, the applicant will have to satisfy the tests propounded to secure the leave to commence the judicial review proceedings. At this stage, the court need not go into the merits of the case, but only to see if the application for leave is frivolous.

Preliminary Objections (PO)

[27] During the hearing of the application, learned Federal Counsel (FC) for the Honourable Attorney General and learned counsel for the putative first and second respondents raised a similar PO. The PO was premised on the following grounds:

(i) the eighth Committal Proceeding is not amenable to judicial review by virtue of art. 121(1A) of the Federal Constitution (FC);

(ii) the validity of law conferring jurisdiction on the Kuala Lumpur Syariah High Court cannot be challenged collaterally in the application; and

(iii) the application was filed out of time.

Issues

[28] Having perused the cause papers, I am of the view that the focal issues to be determined are as follows:

(i) whether the Syariah High Court has jurisdiction to hear contempt for custody order?

(ii) whether the Civil Court has jurisdiction to hear cases involving Syariah matters?

[29] These focal issues will lead to a response on whether the eighth committal proceedings is amenable to judicial review.

The Decision Of The Court

Whether The Kuala Lumpur Syariah High Court Has Jurisdiction For Committal Proceedings (Specific Contempt Of Custody Order)

[30] The core issue that falls to be decided in this judicial review's application is whether the Kuala Lumpur Syariah High Court has the power or jurisdiction to punish an individual for contempt of court?

[31] Syariah Courts in Kuala Lumpur (Federal Territories) are established under s. 40 of the Administration of Islamic Law (Federal Territories) Act 1993 (Act 505) which reads as follows:

Constitution of Syariah Courts

40(1) The Yang di-Pertuan Agong, on the advice of the Minister, may by notification in the *Gazette* constitute Syariah Subordinate Courts for the Federal Territories at such places as he considers fit.

A (2) The Yang di-Pertuan Agong, on the advice of the Minister, may by notification in the *Gazette*, constitute a Syariah High Court for the Federal Territories.

(3) The Yang di-Pertuan Agong, on the advice of the Minister, may by notification in the *Gazette* constitute a Syariah Appeal Court for the Federal Territories.

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[32] Section 46 of Administration of Islamic Law (Federal Territories) Act 1993 (Act 505) provides for the jurisdiction of Kuala Lumpur Syariah High Court which includes to hear and deciding all proceedings related to the issue of custody as follows:

C **Jurisdiction of Syariah High Court**

46(1) A Syariah High Court shall have jurisdiction throughout the Federal Territories and shall be presided over by a Syariah Judge.

(2) A Syariah High Court shall:

D (a) in its criminal jurisdiction, try any offence committed by a Muslim and punishable under the Enactment or the Islamic Family Law (Federal Territories) Act 1984 (Act 303), or under any other written law prescribing offences against precepts of the religion of Islam for the time being in force, and may impose any punishment provided therefor;

E (b) **in its civil jurisdiction, hear and determine all actions and proceedings in which all the parties are Muslims and which relate to:**

(i) ...

F (ii) ...

(iii) the maintenance of dependants, legitimacy, or **guardianship or custody (*hadhanah*) of infants;**

(iv) ...

G (v) ...

(vi) ...

(vii) ...

(viii) ...

H (ix) ...

(x) other matters in respect of which jurisdiction is conferred by any written law. (emphasis added)

[33] Sections 81, 82, 83, 84, 85, 86 and 87 in Part VII of the Islamic Family Law (Federal Territories) Act 1984 (Act 303) clearly provides that Kuala Lumpur Syariah High Court has the power to make any order for custody as follows:

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PART VII – GUARDIANSHIP

***Hadanah* or Custody of Children**

Section 81. Persons entitled to custody of a child.

Section 82. Qualifications necessary for custody.

Section 83. How right of custody is lost.

Section 84. Duration of custody.

Section 85. Custody of illegitimate children.

Section 86. Power of the Court to make order for custody.

Section 87. Orders subject to conditions.

[34] Despite of that, Part XVIII on enforcement and execution of the Syariah Court Civil Procedure (Federal Territories) Act 1998 (Act 585) in Chapter 2 therein specifically outlined all the procedures on enforcement of the judgment of the Kuala Lumpur Syariah High Court.

[35] Section 151 under Chapter 2 of the Syariah Court Civil Procedure (Federal Territories) Act 1998 (Act 585) clearly illustrate that Kuala Lumpur Syariah High Court has jurisdiction for committal proceeding. The said provision reads as follows:

Section 151. Enforcement of judgment to do or abstain from doing an act.

151(1) Where:

(a) person required by a judgment or order to do an act within a time specified in the judgment or order refuses or neglects to do it within that time or within that time as extended or abridged under section 238, as the case may be; or

(b) a person disobeys a judgment or order requiring him to abstain from doing an act, then, subject to this Act, the judgment or order may be enforced by one or more of the following means, that is to say:

(aa) **with the leave of the Court, an order of committal;** or

(bb) where that person is a body corporate, with the leave of the Court, an order of committal against any director or other officer of the body. ` (emphasis added)

[36] Further, Part XXIV of the Syariah Court Civil Procedure (Federal Territories) Act 1998 (Act 585) provides for the matter of contempt of court. Section 229 of Act 585 clearly stipulates that Kuala Lumpur Syariah High Court has the jurisdiction to commence proceedings against anyone for contempt of court which reads as follows:

Section 229. Notice to show cause.

(1) **the Court shall have the jurisdiction to commence proceedings against any person for contempt of Court** and may, in such proceedings, make an order of committal for a period not exceeding six months or may impose a fine not exceeding two thousand ringgit.

(2) Where contempt is committed in the face of the Court, it shall not be necessary for the Court to serve the notice to show cause but the Court shall ensure that the person alleged to be in contempt understands the nature of the offence alleged against him and has the opportunity to be heard in his own defence, and shall make a proper record of the proceedings.

(3) In the case of contempt committed outside Court, notice to show cause why an action or proceedings should not be taken against him shall be served personally on the person alleged to have committed such contempt. (emphasis added)

[37] In our present application, the applicant and the first respondent (as well as his mother, the second respondent) recorded a consent judgment (custody order) in Kuala Lumpur Syariah High Court on, Summon No: 14100-028-0798-2015 (custody proceedings) on 23 July 2018.

[38] It was recorded in the custody order that the applicant was given permanent custody right over all three children and the first and second respondents were given rights of visitation.

[39] There were two violations of the custody order on 6 September 2019 and 18 October 2019 by the applicant.

[40] Therefore, on 31 October 2019, the first respondent filed an application for leave to issue a show cause notice in Kuala Lumpur Syariah High Court, Application No.: 145600-074-0169-2020, the eighth committal proceedings against the applicant.

[41] On 9 February 2022, the Kuala Lumpur Syariah High Court allowed the first respondent's application and a show cause notice and an order were sealed.

[42] Then, on 18 March 2022, the applicant was served with the show cause notice as well as the order dated 9 February 2022. The eighth committal proceedings are currently ongoing at the Kuala Lumpur Syariah High Court.

[43] The subject matter in the applicant's case is regarding custody of her three children after a consent custody judgment (custody order) recorded between the applicant and the first and second respondents in Kuala Lumpur Syariah High Court Summon No: 14100-028-0798-2015.

[44] By virtue of s. 46 of the Administration of Islamic Law (Federal Territories) Act 1993 (Act 505) and ss. 81, 82, 83, 84, 85, 86 and 87 in Part VII of the Islamic Family Law (Federal Territories) Act 1984 (Act 303), it is crystal clear that Kuala Lumpur Syariah High Court has the jurisdiction to hear and determine all proceedings related to the issue of custody. A

[45] The applicant in the present application had breached the custody order on 6 September 2019 and 18 October 2019. B

[46] Section 151 of the Syariah Court Civil Procedure (Federal Territories) Act 1998 (Act 585) specifically mentioned the consequence of disobeying the order of courts is that an order of committal may be given with leave of the court. C

[47] Based on this section, the first respondent was exercising his rights in filing a committal application in the Kuala Lumpur Syariah High Court when the applicant had violated the custody order of the Kuala Lumpur Syariah High Court, it is within the jurisdiction of the Kuala Lumpur Syariah High Court to hear and decide such a case or application. D

[48] Accordingly, based on the above, I am of the view that based on the above provisions, the Kuala Lumpur Syariah High Court has jurisdiction to hear and determine cases on committal proceedings which includes contempt of court for a custody order. E

Whether The Civil Court Has Jurisdiction To Hear Cases Involving Syariah Matters As Well As Review The Decision Of The Syariah Courts?

[49] Reading from the art. 74(1) of the FC, Item 6(e) of List I, the Federal List together with Item 1 of List II, the State List, both under the Ninth Schedule of the FC, it is clear that the power is given to Parliament to enact a law in respect of the matters under the Federal List. F

[50] Item 6(e) of List I, the Federal List further confers power to the Federal Government to make law in respect of the administration of Islamic matter for the Federal Territories to the same extent as provided under Item 1 of List II, the State List. G

[51] Item 1 of the State List, clearly stipulates that guardianship or custody (refer to Part VII of the Islamic Family Law (Federal Territory) Act 1984) (Act 303) is the subject matter within the jurisdiction of Syariah Court. In our present application, the subject matter in the eighth committal proceedings is custody. H

[52] Therefore, it is vibrant that Syariah Court in the Federal Territories of Kuala Lumpur is derived from the Federal List. Thus, it is my view that Parliament has the power to legislate or enact a law for Syariah Court in Kuala Lumpur. Guardianship or custody is part of the Islamic law matters. Hence, Syariah Court in Kuala Lumpur has the power to hear and determine matters regarding custody. I

[53] Next, I wish to highlight art. 121(1A) of the FC. This provision excludes the jurisdiction of the Civil High Court of any matter falling within the jurisdiction of the Syariah Court. Article 121(1A) of the FC reads as follows:

> **Judicial power of the Federation**
>
> 121(1) There shall be two High Courts of co-ordinate jurisdiction and status, namely:
>
> (a) one in the States of Malaya, which shall be known as the High Court in Malaya and shall have its principal registry at such place in the States of Malaya as the Yang di-Pertuan Agong may determine; and
>
> (b) one in the States of Sabah and Sarawak, which shall be known as the High Court in Sabah and Sarawak and shall have its principal registry at such place in the States of Sabah and Sarawak as the Yang di-Pertuan Agong may determine;
>
> (c) (Repealed),
>
> and such inferior courts as may be provided by federal law; and the High Courts and inferior courts shall have such jurisdiction and powers as may be conferred by or under federal law.
>
> **(1A) The courts referred to in Clause (1) shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah Courts.**
>
> (emphasis added)

[54] It can be seen that by virtue of art. 121(1A) of the FC, proceedings before the Syariah Courts and decisions made by the Syariah Courts cannot be reviewed by the civil High Courts.

[55] The insertion of art. 121(1A) of the FC is to stop the practice of aggrieved parties coming to the Civil High Courts to review the decisions made by the Syariah Courts. (See *Sukma Darmawan Sasmitaat Madja v. Ketua Pengarah Penjara Malaysia & Anor* [1999] 2 CLJ 707; [1999] 1 MLRA 175; [1999] 2 MLJ 241; [1999] 2 AMR 2337).

[56] The proceedings and decisions of the Syariah Courts are not amenable to judicial review by the civil High Courts because the Syariah Courts and the civil courts form two separate legal systems and the Syariah Courts are not inferior to the civil courts in terms of appeal and judicial review by superior courts over inferior courts. (See *Syarifah Nooraffyzza Wan Hosen v. Director of Jabatan Agama Islam Sarawak & Ors* [2018] 3 CLJ 620; [2018] 2 MLJ 354; [2017] 6 MLRA 345; [2017] 2 SSLR 387).

[57] Hence, it can be seen that the civil High Court has no power to intervene with the matter that falls exclusively under the jurisdiction of the Syariah Court. Once the matter is found to be within the jurisdiction of the Syariah Court by virtue of art. 121(1A) of the FC, the civil court is not

allowed to intervene or hear such matter unless it involves a constitutional issue which the Syariah Court has no power to hear. (See *Rosliza Ibrahim v. Kerajaan Negeri Selangor & Anor* [2021] 3 CLJ 301; [2021] 2 MLJ 181; [2021] 2 MLRA 70).

[58] Back to the present case, I find that the subject matter is pertaining to the eighth committal proceedings against the applicant where she had violated the custody order of the Kuala Lumpur Syariah High Court. This subject matter does not involve any constitutional issue whereby it is vibrant that the enforcement of the judgment of a custody order is within the jurisdiction of the Syariah Court.

[59] In my recent decision in the case of *Wan Johairiza Wan Ab Rahman v. Mahkamah Rayuan Syariah Selangor & Ors* [2021] 1 LNS 2151; [2022] 2 MLRH 569; [2021] MLJU 2586; I have decided that by virtue of art. 121(1A) of the FC, the civil court has no right to intervene with the decision made by the Syariah Court by way of judicial review. The correct court which has jurisdiction to deal with the dissatisfaction against the decision made by the Syariah Court is the Syariah Court of Appeal itself and a such decision made by the Syariah Court of Appeal is not amenable to review pursuant to art. 121(1A) of the FC.

[60] Based on the above cases and by virtue of art. 121(1A) of the FC, it is apparent that the civil court has no jurisdiction in respect of any matter within the jurisdiction of the Syariah Court nor it can review any decision of the Syariah Court.

Whether The Leave From The Federal Court Is Required To Challenge The Validity Of The Law Conferring Jurisdiction To The Kuala Lumpur Syariah High Court For Contempt Proceedings?

[61] In this present application, the applicant also seeks to challenge the validity of the law conferring the jurisdiction on the basis that the power of contempt is the exclusive power of the civil court and the State Legislature body can't legislate such law.

[62] Article 4(3) and (4) of the FC highlights that any person who seeks to challenge the validity or constitutionality of any law on the ground that the Parliament or the State Legislature has no power to enact the said law must specifically ask a declaration that the law is invalid and such a proceeding may only be commenced with the leave of a judge of the Federal Court.

[63] It is trite that only the Federal Court has the jurisdiction to hear and determine such a challenge. Such a challenge cannot be brought collaterally in an application for judicial review.

[64] Article 128 of the FC reads as follows:

Jurisdiction of Federal Court

128(1) The Federal Court shall, to the exclusion of any other court, have jurisdiction to determine in accordance with any rules of court regulating the exercise of such jurisdiction:

(a) any question whether a law made by Parliament or by the Legislature of a State is invalid on the ground that it makes provision with respect to a matter with respect to which Parliament or, as the case may be, the Legislature of the State has no power to make laws; and

(b) disputes on any other question between States or between the Federation and any State.

(2) Without prejudice to any appellate jurisdiction of the Federal Court, where in any proceedings before another court a question arises as to the effect of any provision of this Constitution, the Federal Court shall have jurisdiction (subject to any rules of court regulating the exercise of that jurisdiction) to determine the question and remit the case to the other court to be disposed of in accordance with the determination.

(3) The jurisdiction of the Federal Court to determine appeals from the Court of Appeal, a High Court or a judge thereof shall be such as may be provided by federal law.

[65] Learned counsel for the applicant submitted that the said provisions of the Civil Procedure Act which confers the jurisdiction or power of Kuala Lumpur Syariah High Court to punish for contempt of court are invalid on the ground that the Parliament has no power to enact such law under Item 6(e) of the List I, the Federal List (read together with Item 1 of the List II, the State List) under the Ninth Schedule.

[66] With regards to this issue, the learned FC submitted that this challenge should be made to the Federal Court under art. 4(4) of the FC where leave of the Federal Court must first be obtained.

[67] The Parliament's competency to establish Syariah Court in Federal Territories relates to a matter enumerated in Item 6(e) of List I, the Federal List under the Ninth Schedule together with Item 1 of List II, the State List under the Ninth Schedule. Therefore, it is the Parliament that has the power to make laws for Kuala Lumpur Syariah High Court.

[68] Since it is well within the Parliament's power to enact the alleged impugned provisions, it is my view that the applicant's challenge did not fall within the scope of art. 4 of the FC.

[69] I find that the validity of the law challenged by the applicant is not on the ground that the Parliament has no power to enact, the matter did not fall under the exclusive original jurisdiction of the Federal Court provided under arts. 4(3), 4(4) and 128 of the FC. As such, the leave of a Federal Court is not necessary for this application.

[70] Such original jurisdiction of the court cannot be invoked if the validity or constitutionality of any law is not challenged on the ground that it is not within the legislative authority of Parliament or State Assembly. Accordingly, such, this court has the power to hear this application.

[71] Hence, the PO and the argument made by the learned FC that the applicant needs to seek leave from the Federal Court is not applicable in this case.

Out Of Time

[72] The FC and the first and second putative respondents have also raised PO that this application was filed out of time.

[73] It is trite law that an application for leave for judicial review should be filed promptly and in any event within three months from the date when the grounds of the application first arose or when the decision is first communicated to the applicant.

[74] This is based on O. 53 r. 3(6) of the ROC which provides as follows:

> (6) An application for judicial review shall be made promptly and in any event within **three months from the date when the grounds of application first arose or when the decision is first communicated to the applicant.** (emphasis added)

[75] There is a number of authorities to support the finding that for the purpose of O. 53 r. 3(6) of the Rules of High Court 1980 and ROC, the 40 days and three months' time frame would only start to run when the applicant had actual knowledge of the relevant decision.

[76] In the Federal Court case of *Wong Kin Hoong & Anor v. Ketua Pengarah Jabatan Alam Sekitar & Anor* [2013] 4 CLJ 193; [2013] 3 MLR A 525; [2013] 4 MLJ 161; [2013] 4 AMR 211, the issues raised before the court were that the trial judge below ought to consider the merits of the case when considering the appellants' application for extension of time for leave to commence the judicial review. Raus Sharif PCA (as His Lordship then was) (delivering the judgment of the court) emphasised and held as follows:

> [30] In conclusion, we are of the view that *the time frame in applying for judicial review prescribed by the Rules is fundamental, it goes to jurisdiction and once the trial judge had rejected the explanation for the delay for extension of time to apply for judicial review, it follows that the court no longer has the jurisdiction to hear the application for leave for judicial review. Whether the application has merits or not, is irrelevant.* (emphasis added)

[77] Reverting to the instant case, I am of the view that an application for leave for judicial review made under O. 53 r. 3(6) of the ROC challenging the decision of the Kuala Lumpur Syariah High Court for the leave for

contempt of court, must be filed within three months from the date was first communicated to the applicant that is on the date when the leave of contempt was given by the Kuala Lumpur Syariah High Court.

[78] In the present application, Kuala Lumpur Syariah High Court granted leave to the first respondent to issue a show cause notice under the eighth committal proceeding on 9 February 2022. This application for leave to commence judicial review was only filed by the applicant on 8 June 2022. This is clearly beyond the three months' time frame as stipulated in O. 53 r. 3(6) of the ROC. There had been a delay on the part of the applicant in filing for leave for judicial review.

[79] Order 53 of the ROC sets out a specific procedure for an applicant to comply with, in order to enable him to invoke the judicial review proceedings. Failure to adhere to the procedure will result in the application being dismissed/not entertained by the court. In the present application, there was clear non-compliance by the applicant with the imperative requirement set out under O. 53 r. 3(6) of the ROC.

[80] It is trite law that strict compliance with the requirements of O. 53 r. 3(6) of the ROC is mandatory. The mandatory nature of the requirements is clearly reflected in the usage of the word 'shall' therein which means that there can be no exceptions unless an extension of time has been applied for and obtained. (See *Kijal Resort Sdn Bhd v. Pentadbir Tanah Kemaman & Anor* [2015] 3 CLJ 861; [2015] 1 MLRA 255; [2016] 1 MLJ 544; [2015] 2 AMR 89).

[81] It is to be noted that the grant or refusal of an extension of time is an exercise of judicial discretion by virtue of O. 3 r. 5 of the ROC.

[82] Order 53 r. 3(7) of the ROC provides that an extension of time may be considered if there is a good reason. The provision reads as follows:

> The Court may, upon an application, extend the time specified in rule 3(6) and if it considers that there is a good reason for doing so.

[83] Thus, the applicant must show good reason for an extension of time and there must be some material for the court to exercise its discretion to grant an extension of time.

[84] Yet again, in *Wong Kin Hoong & Ors* (*supra*), the court further explained that the applicant must justify a good reason for filing the application out of time in order to enable the court to exercise its discretion. Raus Sharif PCA (as His Lordship then was) stressed as follows:

> [30] Further, notwithstanding that the applicants are out of time, **whether pursuant to O. 53 r. 3(6) RHC the Civil Courts have shown 'good reason' for delay on their part and there must be some material for the court to exercise its discretion** (See cases cited on

the second respondent's behalf – (i) *Tengku Anoomshah Tengku Zainal Abidin & Anor v. Collector Of Land Revenue, North East District, Penang & Anor* [1995] 3 CLJ 434 at p. 439 g-l, (ii) *Sabah Berjaya Sdn Bhd v. Director General Of Inland Revenue Department & Anor* [1996] 1 LNS 93; [1996] 5 MLJ 366 at p. 375 F-l, (iii) *Gnanasundaram v. Public Services Commission* [1965] 1 LNS 41; [1966] 1 MLJ 157 at p. 158 B-C right column, (iv) *R v. Stratford - on - Avon District Council And Another, Ex Parte Jackson* [1985] 3 All ER 769 at p. 770 Held 2, (v) *R v. Secretary Of State For The Home Department Another, Ex Parte Ruddock And Others* [1987] 2 All ER 518 at p. 521 hl).

(See *Seruan Gemilang Makmur Sdn Bhd v. Pegawai Kewangan Negeri Pahang* [2016] 4 CLJ 100; [2016] 2 MLRA 597; [2016] 2 MLJ 225; [2016] 2 AMR 518).

[85] In the applicant's affidavit 1, the applicant merely avers that she was only aware of the grounds to challenge the committal proceedings after being advised of the same by her lawyer and she was only recently aware that she has the right to file a judicial review application against the Syariah Court.

[86] Following the above cases, I am of the considered view that the applicant's averments do not constitute a good reason for an extension of time. The applicant's excuse for the delay in filing this application that she was only aware of the grounds to challenge the committal proceedings after being advised of the same by her lawyer and she was only recently aware that she has the right to file a judicial review application against the Syariah Court is unacceptable. The said averments, to me, do not explain the delay in filing this application and the said averments are bare averments that are not substantiated with any particulars or any documentary evidence.

[87] The situation in our present application is similar to the case of *Chong Wee Been lwn. Lembaga Pencegahan Jenayah & Yang Lain* [2017] 1 LNS 903; [2017] MLRHU 558 where the High Court dismissed their application for extension of time to challenge a Police Supervision Order that was premised on the applicant's ignorance of his right to challenge such an order.

[88] Applying the same principle to the facts of the present application, I am of the view that this court has no jurisdiction to hear this application for leave to commence judicial review on the ground that the time frame of three months under O. 53 r. 3(6) of the ROC has not been complied with.

Continuing Illegality

[89] The applicant also contends that the committal proceedings are ongoing and as such, the time limit to make an application as provided by O. 53 r. 3(6) of the ROC has not expired.

[90] It must be noted that the fact that the committal proceedings are still ongoing does not change the starting point of the time period as stipulated under O. 53 r. 3(6) of the ROC.

[91] Based on O. 53 r. 3(6) of the ROC, I am of the view that the time period to file the judicial review application starts from the date when the grounds of the application first arose, that is when the Kuala Lumpur Syariah High Court first exercised the jurisdiction on the committal proceedings by granting leave to issue the show cause notice.

[92] I am of the considered opinion that the time period prescribed by O. 53 r. 3(6) of the ROC does not recognise the continuity of act or injury as it was not expressly provided.

[93] The provision of O. 53 r. 3(6) of the ROC can be compared and contrasted with the provision of s. 2(a) of the Public Authorities Protection Act 1948 (Act 198) which expressly provides for continuing injury, as follows:

> **Protection of persons acting in execution of statutory or other public duty**
>
> 2. Where, after the coming into force of this Act, any suit, action, prosecution or other proceeding is commenced in the Federation against any person for any act done in pursuance or execution or intended execution of any written law or of any public duty or authority or in respect of any alleged neglect or default in the execution of any such written law, duty or authority the following provisions shall have effect:
>
> (a) the suit, action, prosecution or proceeding shall not lie or be instituted unless it is commenced within thirty-six months next after the act, neglect or default complained of or, in the case of a continuance of injury or damage, within thirty-six months next after the ceasing thereof;

[94] Thus, in absence of an express provision on continuing act or injury under O. 53 r. 3(6) of the ROC, the applicant's contention that the committal proceedings are still ongoing should not be considered in determining the time period to file a judicial review application.

[95] The only matter which should be considered in determining the time period to file a judicial review application as expressly stipulated by O. 53 r. 3(6) of the ROC is the date when the ground of application first arose or the date when the decision is first communicated to the applicant.

[96] It is my view that the 'decision' was on the day the leave for contempt was granted by the Kuala Lumpur Syariah High Court.

Conclusion

[97] For all the reasons given above, I am of the view that leave to commence judicial review application by the applicant was filed outside the stipulated three months' time frame provided for under O. 53 r. 3(6) of the ROC.

[98] The three months period started to run from the date when the decision of the Kuala Lumpur Syariah High Court granted leave for contempt of court was first communicated to the applicant on 9 February 2022.

[99] Since the leave for judicial review application was only filed by the applicant on 8 June 2022, it was clearly outside the stipulated three months period. Further, I find that the application for an extension of time also had not been supported with good reason that it should be granted.

[100] Therefore, the PO raised at paras. 27(a) and (c) above is allowed.

[101] Hence, this court has no jurisdiction to grant leave and to hear the substantive judicial review application. This leave application (encl. 32) must therefore be dismissed with costs of RM2,000 to be paid by the applicant to the Honourable Attorney General without the allocator fee except for the putative first and second respondents where the applicant is to pay costs of RM2,000 subject to the allocator fee.